DATE: January 12, 1999

CASE NO: 1998-INA-79

In the Matter of

AMERICAN GAS & SERVICE CENTER
Employer

on behalf of

ASIRI DE SILVA
Alien

Appearances: Sam Amaratunge, lay representative for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from American Gas and Service Center's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On September 28, 1994, the Employer filed a Form ETA 750 Application for Alien Certification with the California Employment Development Department ("EDD") on behalf of Alien, Asiri De Silva. The job opportunity was listed as "Manager Service Station [and] Mini Market". The job duties were described as follows:

> Generally manage Service Station and Mini Market for profits. In this respect plan & implement policies; hire, train and supervise employees; assign duties to employees; participate in customer service activities such as pumping gasoline, oil-change, servicing; purchase merchandise and settle payments; prepare daily accounts; prepare periodical financial statements of the business for inspection by the ownership; attend customer-complaints.

(AF 27). The stated job requirements for the position, as set forth on the application, included 2 years experience in the job offered. Other special requirements included: "1. Possess managerial knowledge in all activities of business, Auto Service Station and Mini Market, 2. Possess a knowledge in account keeping, 3. Speak, read and write English, 4. Possess referable references." (Id.).

On April 24, 1995, EDD transmitted the resumes of 10 U.S. applicants to the Employer. (AF 78-115). According to the Employer's Results of Recruitment Report, the applications and resumes were received by Employer on April 28, 1995 and interview invitation letters dated May 2, 1995 were sent out by regular mail to all 10 applicants, scheduling the interviews for May 19, 1995. The Employer provided copies of the letters and the envelopes sent to the applicants. (AF 51-77). Since the employer did not use certified mail, it did not have signed return receipts from the applicants indicating if or when the letters were received. On June 1, 1995, Employer reported that out of the 10 applicants, applicants Uribe, Nelson and Obenreder appeared for their scheduled interviews but were not hired. Applicants Bamford and Johns telephoned employer to inform him that they were not interested in the job. Applicant Booth contacted Employer by letter to inform him that she had accepted a position with another company. Applicants Cybulski, Dishaw, Jennings and Sturgis failed to attend the pre-scheduled interviews and never contacted Employer. (AF 38).

On March 20, 1996, the CO issued a Notice of Findings ("NOF") proposing to deny the certification due to insufficient recruitment efforts. (AF 23-25). First, the Employer did not contact U.S. Applicants in a timely manner. The CO found that the Employer's effort to contact qualified applicants Dishaw, Booth, Jennings and Cybulski did not take place until May 19, 1995, four weeks after Employer's receipt of the applications. (AF 24). The CO also found that applicant Jennings reported in the post recruitment follow-up questionnaire that he was not contacted by Employer at all. (Id.). Second, the Employer's recruitment effort was tardy and incomplete. The CO found that the Employer did not conduct a good-faith recruitment effort. (Id.).

The Employer submitted its rebuttal dated April 4, 1996. (AF 9 -22). The Employer stated that letters of invitation scheduling interviews for May 19, 1995 were mailed out to all 10 applicants on May 2, 1995. The Employer submitted a signed declaration that it had contacted all 10 applicants, including applicant Jennings, by letter on May 2, 1995 and none was left out in scheduling the interviews. (AF 22). In response to the CO's finding that it had failed to recruit qualified applicants in good faith, the Employer stated that it had sent out invitations for interviews 4 days after receiving the applicants' resumes and that only 3 applicants appeared for their scheduled interviews. (AF 12). The Employer explained that applicants Uribe, Nelson and Obenreder were closely interviewed but none of them could establish that they possessed the required work experience and were rejected for lawful job related reasons. The Employer concluded that those applicants who did not attend their scheduled interviews were either not interested or were unwilling to accept the job. In response to the allegation that applicant Jennings was never contacted, the Employer stated that if 9 applicants received the letters of invitation, then there was no reason why applicant Jennings would not have received the letter as well. The Employer did not pursue any alternative methods of contacting the qualified applicants. On April 3, 1997, the CO issued a Final Determination ("FD") denying certification. (AF 5-6). The CO found that the Employer did not respond to the NOF request for documentation that it had made a timely contact effort to the 4 qualified applicants and did not provide evidence convincing enough to show that it had made a good-faith effort to recruit these workers. (AF 6).

On April 28, 1997, the Employer filed a Notice of Appeal. (AF 2-4). Subsequently, this case was forwarded to the Board of Alien Labor Certification Appeals for review.

Discussion

Section 656.21(b)(6) requires the employer to document that U.S. applicants were rejected solely for lawful job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. Daniel Costuic, 94-INA-541 (Feb. 23, 1996); H.C. LaMarche Ent., Inc., 87-INA-607 (Oct. 27, 1988). In circumstances in which an employer's actions indicate a lack of good faith recruitment effort, an employer has not proven that there are not sufficient U.S. workers who are able, willing and available to perform the work as required under Title 20 of the Code of Federal Regulations, Section 656.1. In the NOF the CO suggested there was no good faith effort on the part of the Employer as it waited 4 weeks to contact the qualified

applicants. The issues in dispute are whether the Employer provided documentation proving that it contacted the applicants in a timely manner and whether its recruitment efforts were tardy and incomplete or were, in fact, in good faith.

We agree with the CO that the Employer failed to establish that it had made timely contact with the qualified applicants. The Employer provided copies of 10 interview invitation letters dated May 2, 1995 and submitted a signed declaration that these letters were in fact sent on May 2, 1995. An employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know the job is clearly open to them. Loma Linda Foods Inc., 89-INA-289 (Nov. 26, 1991) (en banc). While the Employer asserts that such contact was made on May 2, 1995 when the letters were allegedly sent out, the Employer has provided no evidence documenting if or when applicants received these letters.

The burden is on the Employer to substantiate its assertion that it made contact promptly with potentially qualified U.S. applicants. See, Mrs. Gil Steinberg, 93-INA-102 (Feb. 11, 1994); Flamingo Electroplating, Inc., 90-INA-495 (Dec. 23, 1991); Harvey Studios, 88-INA-430 (Oct. 25, 1989). While there is no requirement that an employer use certified mail to contact applicants, copies of certified mail, return receipt requested would prove that the employer timely contacted the U.S. applicants. See, Light Fire Iron Workers, 90-INA-2 (Nov. 20, 1990); Bel Air Country Club, 88-INA-223 (Dec. 23, 1988). Furthermore, by not using certified mail the Employer, in this case, has attempted to evade the requirements of good faith recruitment.

Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. Diana Mock, 88-INA-255 (April 9, 1990). Although there is no requirement that "employers must, in every case, attempt to telephone U.S. applicants," reasonable efforts to contact qualified U.S. applicants may, in some circumstances, require more then one type of attempted contact. (Id.). The Employer was supplied with applicants telephone numbers as well as their addresses. Since the letters were not sent out return receipt requested, the Employer had no way of knowing whether applicants had received the letters. Applicant Jennings responded to the follow-up questionnaire that he was never contacted at all. The Employer rebuts that there is no reason why applicant Jennings would not have received the letter if the 9 other applicants received theirs, and that Employer had no reason to leave out one applicant from the interviews. Due to the fact that only 5 applicants submitted the follow-up questionnaires, we do not know whether or not all of the other applicants received their letters. (AF 42-50). Under the circumstances, a follow-up phone call or letter by the Employer would have been reasonable in light of the poor response to the invitation to interview. In this case, the Employer did not demonstrate reasonable efforts to contact applicants Cybulski, Dishaw or Jennings. See, e.g. Diana Mock, 88-INA-225 (April 9, 1990); Alliance Welding & Steele Fabricating, Inc., 90-INA-57 (Dec. 17, 1990).

Even if we assume that the letters of invitation were sent out to applicants on May 2, 1995, we are in agreement with the CO that this does not constitute a good faith effort to recruit. The invitation letters consisted of a 1 sentence request for the applicant's presence at the Employer's

office for an interview at a specified time on May 19, 1995, almost 4 weeks after the Employer had received the resumes. The Employer's rebuttal states that by sending out these letters 4 days after the receipt of them, the Employer acted in good faith and did not contribute to any delay in the recruitment process. We disagree with the Employer's assertions. Out of the 10 applicants for the position, only 3 appeared for their interviews.

We also agree with the CO's finding that the Employers recruitment efforts were tardy and incomplete. The employer scheduled the applicants interviews for 4 weeks after receipt of their resumes. This delay in contact may result in the U.S. applicants losing interest in the position. "Allowing an employer to delay contact would be tantamount to allowing an employer to thwart the policy of preferring qualified workers over aliens for U.S. jobs." Loma Linda Foods Inc., 89-INA-289 (Nov. 26, 1991) (en banc). The "as soon as possible" standard does not embody a specific time limit but turns on a variety of factors concerning how long an employer requires for a reasonable examination of the applicants' credentials. (Id.). Here, the Employer asserted that the delay in the recruitment process was only to afford the applicants sufficient time to get ready for the interviews. (AF 10). The job opportunity was for a manager of a gas station and mini market. The job requirement was 2 years experience in the job offered. The recruitment was local and the applicants had already submitted their resumes and cover letters. The Employer's bare assertion that holding the interviews on May 19, 1995 did not contribute to the delay in the recruitment process but was necessary in order to provide applicants with "sufficient time for the interviews" is not adequate documentation of a reasonable delay. Prior to the May 19 interview, Applicant Booth indicated that she was no longer interested in the job. The Employer's four week delay in scheduling the interview may have caused the applicant to believe that the Employer was not seriously interested in considering her for the job. See, e.g., Naegle Associates, Inc., 88-INA-504 (May 23, 1990). Furthermore, it is reasonable to assume that applicants would continue to search for alternative employment opportunities due to the delay in their interviews with the Employer, and that by delaying the date of the interview, Employer increased the likelihood that applicants would find other work.

By sending the interview letters through non-certified mail and by setting the interview date so far in the future, the Employer was unable to know if or when applicants received their letters. By its conduct it evaded the requirement to contact qualified U.S. applicants by other appropriate means. Since the Employer has failed to demonstrate that it contacted the U.S. applicants in a timely manner, or that its delay was justified, the CO properly denied certification because the Employer's recruitment effort lacked good faith.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

_____

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California